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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 227

ANTHONY RUSSO,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

The petitioner, Anthony Russo, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of New Jersey rendered in these proceedings on March 10, 1970.

Opinions Below

The opinion of the Supreme Court of the State of New Jersey, as yet unreported, appears at Appendix A, *infra*, p. 1a. The opinion of the Appellate Division of the Superior Court of New Jersey is unreported, and appears at Appendix B, *infra*; p. 7a.

Jurisdiction

The order or judgment of the Supreme Court of the State of New Jersey was entered on March 10, 1970. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1257 (3).

Questions Presented

It is the contention of the petitioner Anthony Russo that, when he appeared before the Monmouth County Grand Jury on October 31, 1967, he was a target and a prospective defendant of the Grand Jury investigation, which had only begun in September, 1967. It is further alleged that one of the main reasons for the convening of the Grand Jury and the basic purpose of the Prosecutor in subpoenaing said Anthony Russo was to obtain an indictment against him, either for perjury or any substantive offense which the petitioner might have admitted to in answering questions by the Prosecutor. It is undisputed that, at the time the petitioner was questioned, there was no immunity statute in New Jersey applicable to the Grand Jury and at no time did the Prosecutor offer to give the petitioner any type of immunity in return for his testimony, nor did the Prosecutor at any time advise petitioner of his constitutional privilege against self-incrimination.

The questions thereby arising are:

1. Whether the failure of the Prosecutor to advise the petitioner of his constitutional privilege against self-incrimination, where the petitioner was one of the targets of the Grand Jury investigation, violated petitioner's rights under the Fifth and Fourteenth Amendments of the United States Constitution.

2. Whether the failure of the Prosecutor to advise the petitioner of his rights under the Fifth Amendment would vitiate a subsequent conviction arising out of petitioner's testimony before the said Grand Jury where the crime involved was perjury.

Constitutional Provisions Involved

Constitution of the United States, Amendment V:

> "No person shall . . . be compelled to any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

Constitution of the United States, Amendment XIV, sec. 1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . ."

Statement of Facts

The facts relevant to the question presented by this petition are introduced to the Court in a summary fashion, as follows:

This case concerns the availability of the Fifth Amendment to a witness who, at the time he is subpoenaed to testify before a Grand Jury, is undeniably a prospective defendant or the target of such a Grand Jury investigation. The Grand Jury investigation involved in this instance arose as a result of an article which appeared in *Life Magazine* on September 1, 1967, concerning the influence of organized crime upon various governing bodies and municipalities throughout the United States. This article is reproduced in the record filed with the Appellate Division of the Superior Court of New Jersey which is made part of this petition for writ of certiorari.

It is clear from the article that petitioner Anthony Russo was mentioned prominently throughout the article and was characterized as a New Jersey gangster and "betting boss" in Monmouth County. Specifically, the magazine claimed that the City of Long Branch was a prime example of how the Cosa Nostra controlled a municipality. The magazine then went on to state:

> "The power of the Fix in certain areas of New Jersey is just about total. In Long Branch, for example, a town of 26,000 on the Jersey shore, Russo told the informant that the Mob had taken charge. Russo bragged that they had fixed elections and maneuvered the ouster of a city manager. 'What we got in Long Branch is everything,' said Russo. 'Police we got, Councilmen we got, too. We're gonna make millions.'"

As soon as this article appeared on the newstand, local and other officials immediately demanded an investigation to determine the truth of the allegations contained in the said article. Consequently, a Monmouth County Grand Jury was impaneled some time in September, 1967, to investigate the complaint of Milton Garr and the City-wide Civic Association of Long Branch to the effect that the government and Police Department of this municipality were under the control of corrupt and evilly disposed persons, to the obstruction of justice and the detriment of the City of Long Branch.

After the Grand Jury was convened, several police officers, namely Detective Michael Irene and Patrolman Serafino Maccioli of the Long Branch Police Department and Trooper Raymond Castellano of the New Jersey State Police, appeared before the Grand Jury for the aforesaid purpose of advising them of a conversation allegedly held with the petitioner outside a restaurant on

or about April 24, 1967, in which the petitioner allegedly said that "he could control the Mayor, that he had three Councilmen and that tonight or tomorrow he would have number four, and words to the effect that he, the said petitioner, had the Mayor in his pocket and could control the said Mayor."

After hearing this testimony, the Grand Jury decided to subpoena the petitioner, Anthony Russo, to appear before them on October 31, 1967, for the admitted purpose of testifying as to the truth or falsity of the alleged statements made by the three police officers. It is undisputed by the State that the subpoena issued to the petitioner did not contain any information as to the nature and scope of the Grand Jury investigation or any reason why he was subpoenaed. In addition, it is undisputed that the Prosecutor, prior to the questioning of the petitioner, did not advise said petitioner that he was a prospective target of the Grand Jury investigation and that, if he so desired, he had the right to invoke the Fifth Amendment if he felt that any questions propounded by the Prosecutor and tend to incriminate him. The interrogation by the Grand Jury was in a private room and petitioner at no time was able to consult counsel during the said questioning.

Furthermore, at no time was petitioner ever told prior to his questioning that anything he might say to the Grand Jury could be used against him in a subsequent criminal prosecution and at no time was petitioner ever asked to sign a waiver of immunity, although this is the proper practice where one of the targets of a Grand Jury investigation is being questioned.

In the course of his testimony, petitioner denied the statements attributed to him in *Life Magazine* as well as those attributed to him by the police officers in their prior testimony before the Grand Jury. Petitioner was

thus indicted for perjury and, after his first trial ended in a hung jury, he was tried a second time and convicted for perjury on October 30, 1968, and sentenced to a term of not less than three nor more than five years in the New Jersey State Prison as well as a fine of $2,000.00.

An appeal was subsequently taken to the Appellate Division of the New Jersey Superior Court and that Court affirmed the conviction in an unanimous opinion which is presented in the appendix to this petition. The Appellate Division in its opinion stated that, even assuming that the petitioner was a target of the Grand Jury investigation, the Fifth Amendment mandate against compelling a person to be a witness against himself is not related to perjury and that the constitutional right to remain silent, while it is intended to protect a person from incriminating himself, does not apply where the crime involved is perjury.

An application was then made to the New Jersey Supreme Court to certify the case, and this application was denied in a summary manner without any opinion on the merits of the petitioner's application having been rendered.

Reasons for Granting the Writ

The decision of the New Jersey Superior Court, Appellate Division, which has apparently been adopted by the New Jersey Supreme Court, due to its failure to certify this case for its own determination, conflicts with the petitioner's constitutional rights under the Fifth and Fourteenth Amendments. This decision, while recognizing that petitioner was, in fact, a target for the Grand Jury investigation, nevertheless rests on the forfuitous circumstance that the petitioner's constitutional rights do not apply where the crime involved is perjury. The opinion of the Appellate Division in regard to this issue cites

no cases which support the view that the Fifth Amendment does not apply where the crime involved is perjury.

Research has revealed no decision from this Court which has ruled upon this precise issue. We have found several Federal lower court decisions which have apparently held that *Miranda* type warnings need not be given to Grand Jury witnesses, even to those to whom the proceedings have become accusatory. These decisions appear to say that, under such circumstances, a violation of a defendant's rights does not bar a perjury prosecution for false testimony before the Grand Jury. See *U. S.* v. *DiGiovanni,* 397 F. 2d 400 (1968); *Cargill* v. *U. S.,* 381 Fed. 849 (10th Cir. 1967), cert. denied 389 U. S. 1041 (1968); *U. S.* v. *DiMichele,* 375 Fed. 959 (3rd Cir. 1967), cert. denied 389 U. S. 838 (1967); *U. S.* v. *Rosen,* 353 F. 2d 523 (2nd Cir. 1965), cert. denied 383 U. S. 908 (1966); *U. S.* v. *Winter,* 348 F. 2d 304 (2nd Cir.), cert. denied 382 U. S. 955 (1965); *U. S.* v. *Parker,* 244 F. 2d 943, cert. denied 355 U. S. 836 (1957).

However, all of these cases are readily distinguishable from petitioner's case, and we submit are not applicable. In *DiGiovanni, supra,* the record shows that the defendant was effectively warned of his rights prior to his Grand Jury testimony, that he was told that anything he said before the Grand Jury could be used against him and that he had a right to consult legal counsel prior to answering any questions before the said Grand Jury. The said defendant then agreed to testify after being so advised to sign a waiver of immunity which he proceeded to do. Here, petitioner was never advised of his rights prior to his testimony and at no time was he ever asked to sign a waiver of immunity. Thus, this case differs markedly from *DiGiovanni.*

In *Cargill* v. *U. S.*, *supra*, the defendant was an experienced attorney of many years standing, and the record showed that he was well aware of his Fifth Amendment rights. Furthermore, there was no showing in that case that the defendant was the target of the Grand Jury investigation. Here, petitioner was the target of the investigation, was not an attorney and no indication appears in the record that petitioner was aware of those rights of which he could avail himself if the situation so demanded.

In *U. S.* v. *DiMichele*, *supra*, the defendant at the time he appeared before the Grand Jury was not a target of the investigation but was only a witness, and, in addition, when he was interrogated by the F.B.I. prior to his appearance before the Grand Jury, defendant *DiMichele* had been completely advised of his right to remain silent and the other *Miranda* rights and, after being so advised, he then made admissions which he later denied while under oath to the Grand Jury. Thus, in *DiMichele*, it is a case where defendant prior to making any statements or admissions was fully advised of his rights along the lines of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) was disposed to make a statement to the F.B.I. Then, when later subpoenaed to appear before the Grand Jury as a witness, subsequently denied the statements which he had previously made to the F.B.I. when questioned. There again the case differs substantially from petitioner where no warnings of any type were ever given to petitioner and petitioner was at least one of the targets of the Grand Jury investigation.

In *U. S.* v. *Winter*, *supra*, the defendant was told prior to being interrogated by the Grand Jury that he was a prospective defendant and was advised of his privilege against self-incrimination. This is a completely different situation from the case at bar where the petitioner was

never so advised and did not in fact sign a waiver of immunity as was done in *Winter*.

Finally, in *U. S.* v. *Parker, supra*, the court's ruling was based upon the fact that the defendant was only a witness and was not the target of the Grand Jury investigation, and hence there was no duty to warn him under the law. The Court stated as follows:

> "In the setting of this case based upon the record, we think it insufficiently demonstrated that the investigation undertaken by the January 1955 Grand Jury was aimed at accusing Parker by way of indictment. Consequently, it was unnecessary that the Federal prosecutors advise him of his constitutional privilege at that time."

Consequently, it can be seen from a review of these cases that they do not present the precise situation which exists with respect to petitioner. Here we respectfully submit that the petitioner was certainly at least one of the targets of the Grand Jury investigation and the record is barren of any attempt by the Prosecutor to warn the petitioner of the dangerous situation which he was in and of the petitioner's right to exercise his privilege against self-incrimination.

In contrast to these Federal cases, petitioner has found numerous state cases which have held under the precise circumstances present here that the Fifth Amendment does protect a defendant against any incrimination including perjury, and that there is no constitutional reason for drawing a distinction between perjury and other crimes.

In *People* v. *Allen*, 166 N. W. 2d 664 (Ct. App. Mich. 1969), the Michigan Court of Appeals vitiated a conviction against several police officers who had been indicted

for perjury based upon answers to questions propounded to them by a Grand Juror. In that case, the Court of Appeals held that, where police officers were coerced by fear and threats of losing their jobs into thus signing waivers of immunity, then the said waiver was involuntarily obtained and that the answers obtained by the Prosecutor were invalid in a subsequent perjury prosecution against those defendants. In that case, it was an essential part of the Prosecutor's theory that the alternative of committing perjury was not available to the defendants on the basis that even the denial of their constitutional rights could not constitute a license to commit perjury. The Court in *Allen* held that to distinguish perjury from the protection of the Fifth Amendment was without merit. The Court branded as a "gossamer" distinction the State's theory that, when a substantive offense is involved the privilege against self-incrimination applies, but when the charge of perjury is involved the Fifth Amendment does not apply. The Court stated as follows:

> "Under our system, the prosecuting authority is not authorized to nullify a constitutional right by drawing such a gossamer distinction." (*People* v. *Allen, supra,* at 607).

The Court in *Allen* further stated that to hold that the Fifth Amendment applies to a Court where perjury is not involved but does not apply where perjury is the charge would violate another fundamental principle of constitutional application; namely, that one cannot justify an invasion of constitutional right by what such invasion reveals. *U. S.* v. *Dilie,* 332 U. S. 581 (1948).

Of course, we readily admit that the holding in *Allen* was based upon the fact that the waiver obtained by the Prosecutor had been obtained through coercion in that

the defendants were forced to sign a waiver on the threat of losing their jobs. However, the significant part of *Allen* is that the Court there held that if the waivers were obtained invalidly, then the waiver would apply to any such conviction such as larceny, arson or perjury. The Court could see no reason for distinguishing between a substantive offense and perjury. We submit that the same reasoning applies here. In this case, the petitioner could not make an intelligent waiver of his rights under the Fifth Amendment because he was never advised of his rights and to say that the Fifth Amendment protects in a substantive offense and not in perjury, where the results are the same, is to draw a distinction which, we submit to the Court, is neither constitutional nor fair.

The effects of a perjury conviction are immediately as devastating as the effects of a conviction for any other substantive offense. The Court in *Allen* branded the argument of the State that, because the offense was perjury, the use of a coercive waiver did not apply as a false, syllogistic argument, and the Court pointed out that "if coercion can be ignored so easily by such word play, coercion without such word play and false justification is lurking nearby." (*People* v. *Allen*, *supra*, at 668).

Another example of a case where the duty to warn a defendant was held applicable to a perjury conviction was the case of *State* v. *Ruggeri*, 429 P. 2d 969 (Utah 1967), wherein the defendant was a County Commissioner who was publicly being criticized for paying more rental on a paving machine than the cost of buying the same would have been. He was subsequently subpoenaed before a Grand Jury and indicted for perjury in connection with testimony elicited by the Prosecutor before the Grand Jury. On his pretrial motion to suppress the

testimony before the Grand Jury, the Supreme Court of Utah held that as the target of an investigation the defendant could not be interrogated unless he was advised of his constitutional rights and as to the reason why he was being interrogated. The Court pointed out that to fail to so warn one so being investigated is to entrap him and to violate his constitutional privilege against self-incrimination. The Court noted that the process by which the alleged perjury was committed was in a most serious aspect a violation of defendant's constitutional right not to be compelled to testify against himself. The Court stated as follows:

> "The least that may be said of the proceedings by which this defendant was induced to perjure himself is that the state in thus compelling either a sworn confession or perjury, was morally an aider and abettor in the perjury charged.
>
> "The law which governs inquisitions before grand juries does not contemplate that an accused person, whose alleged crimes are at the time the subject of inquiry may be compelled to come before such a jury and there in secret and on oath, without counsel or friends be required either to confess his guilt or to commit perjury.
>
> ". . . It would seem that a witness who is unaware that he is a target of a grand jury investigation could not intelligently determine whether or not he needed counsel unless he was fully advised of the charges being considered against him; and until he has full knowledge regarding that matter, he will not know when to assert his constitutional claim of privilege against self-incrimination."

The Court then held that the trial judge was correct in suppressing the perjurious testimony which had been elicited in the Grand Jury room under these circumstances.

We submit that the principle of this case is on all fours with the present case. There is no question that petitioner was under investigation and that it was the purpose of the Prosecutor in subpoenaing the three police officers prior to *Russo* either to entrap the petitioner into a confession of bribery, obstruction of justice or misconduct in connection with his alleged dealings with public officials or in the alternative to elicit from him a perjurious statement which the prosecution anticipated petitioner would make. Had petitioner been advised of his right to remain silent and had he been aware of the subject for which he was being interrogated, it is possible that petitioner under these circumstances would have invoked his Fifth Amendment privilege and said nothing. Thus, it is quite possible that there could have been no perjury indictment had petitioner been made aware of the availability of his constitutional rights. Fundamental fairness demanded that the Prosecutor, in dealing with a defendant of this type and knowing that he was at least one of the Grand Jury's prime targets, at least advise him of his rights and, prior to allowing him to testify, obtain from him a waiver of immunity as has been admittedly suggested by the New Jersey courts themselves. See *State* v. *Sarcone*, 96 N. J. Super. 501, 513 (Law Div. 1967).

Research has revealed numerous other cases where a perjury conviction was vitiated by the failure to advise a defendant who is the target of a Grand Jury investigation of his right to remain silent. In *State* v. *Byington*, 200 P. 2d 723 (Sup. Ct. Utah 1948), the Supreme Court of Utah held that, when the Court compels a per-

son to testify, the testimony so elicited cannot be used against the defendant in a perjury charge arising out of his testimony.

The Court in the *Byington* case quoted a statement by the Missouri Supreme Court in *State* v. *Caperton*, 276 Mo. 314, 207 S. W. 795 (1918), where the Court stated as follows:

> "As a basis for this prosecution defendant was haled before a grand jury of his county, and there under oath compelled to answer certain questions, truthful answers to which would (as the state is now here insisting) have required a confession of his guilt of another crime then under investigation by this jury. When defendant was thus compelled by these proceedings before the grand jury, either to 'confess and be hanged' or to swear a lie; he took refuge (again, as the state now here contends) in the latter alternative. Promptly he was indicted for perjury, and this prosecution and conviction followed."

The Court here pointed out that there was no possible reason to allow a defendant to either confess to a crime or perjure himself when the Fifth Amendment right of self-incrimination was available. Again, we submit that the same argument applies to petitioner Russo. By virtue of the questions asked him, he had a choice of admitting the truth of the statements attributed to him and thus face certain indictment for obstruction of justice, bribery or other crimes or to deny the truth of the statements and subject himself to a prosecution for perjury, when all the time the refuge of the Fifth Amendment was available to him.

If this were a situation where petitioner had been granted immunity, then, of course, a different situation

would arise. In such circumstances, the right to take refuge under the Fifth Amendment would disappear because the petitioner would have been given immunity. He would thus be protected from having his answers to questions asked him form the basis of a prosecution against him and would thus be under a duty to answer them truthfully in view of the immunity granted him. But, here, where petitioner received no immunity, he is confronted with an impossible choice and one which in all fairness he is not required to face. Fundamental fairness demands that under such circumstances he be advised of the availability of the Fifth Amendment and other constitutional rights.

Finally, in *Twiggs* v. *State*, 75 S. W. 531 (Tex. Cr. R. App. 1903), the defendant Twiggs was subpoenaed to testify as a witness before a Grand Jury which had been investigating a rape charge against a man other than Twiggs. Defendant was later charged with perjury as a result of testifying before the said Grand Jury. The record revealed that he was not warned, when he was in the Grand Jury room, of his privilege under the Fifth Amendment to refuse to give any evidence which might tend to incriminate him. The Court went on to hold that the testimony given before the Grand Jury was not admissible as evidence because the defendant was not advised of his right to avail himself of the Fifth Amendment even though he did not claim such privilege where in fact he had not been warned that such a privilege existed. See also *Claborn* v. *State*, 171 S. W. 862 (Sup. Ct. Ark. 1914).

The decisions of these state cases at this point in our history seem to be more in accord with the latest decisions of this Court than the Federal lower court decisions. In the previously cited landmark case of *Miranda* v. *Arizona*, *supra*, this Court held that, at all times during a custodial interrogation of a defendant, the prosecution could not use statements taken from a defendant, whether such state-

ments were exculpatory or inculpatory, unless it demonstrated the use of certain procedural safeguards effective to secure the defendant's privilege against self-incrimination. This Court stated that by custodial interrogation it meant questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. It would appear clear that a witness summoned to appear before a Grand Jury, who clearly is one of the targets of such a Grand Jury's investigation and whose presence has been compelled by the use of the subpoena, would certainly seem to be subjected to a custodial type of interrogation when he is interrogated by a prosecutor in the presence of 24 Grand Jurors in a quiet room without the benefit of counsel.

While petitioner recognizes that the investigatory function of the Grand Jury could be disrupted if *Miranda* were held to apply to mere witnesses summoned before such Grand Juries, such reasoning should not apply where the said witness is no longer a witness but rather the target of the said Grand Jury investigation, and under such circumstances due process demands that such a defendant be told of his constitutional privilege against self-incrimination.

For the same reason, there is no justifiable constitutional mandate for treating the crime of perjury in a different light than any other crime.

As heinous as the crime of perjury is under our law, it is entitled to the same constitutional right of the citizen to have at his disposal his right to invoke the Fifth Amendment as any other offense. As was stated by Judge Hammond as far back as 1897 in the case of *U. S.* v. *Bell*, 81 F. 834 (1897):

> "In my judgment, he cannot have the protection of the constitution, and be compelled to testify in spite of it; and his right to protection; is paramount to any public policy or necessity for punishing false swearing, and, like all other desirable ends in government and all other public policies, this must yield to a constitutional guaranty which protects the citizen against invasion of his privileges. The public policy of protecting him is as much cherished by English and American sentiment as is that which insists on the purity of oaths. We must get along as best we can wtihout breaking down the constitutional privilege, no matter what inconvenience or loss may result, or else change the constitution."

Thus, we submit that there is no meaningful reason to hold, as the lower and Appellate did, that the Fifth Amendment applies to substantive offenses but does not apply to the crime of perjury where, as it is shown, the defendant is placed in an impossible position and is denied the fairness which under the Fifth and Fourteenth Amendments he is entitled to. The results of a conviction for perjury are as immediately devastating as a conviction for any other offense and to hold that the Fifth Amendment protection against self-incrimination holds to one and not the other is to decide the case in a manner which looks to form and not to substance.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New Jersey Supreme Court.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

Opinion of the Superior Court of New Jersey, Appellate Division

Argued December 22, 1969—Decided Jan. 15, 1970.

Before JUDGES SULLIVAN, HALPERN and MATTHEWS.

On appeal from the Monmouth County Court.

Mr. *Morris Brown* argued the cause for appellant (Mr. *Robert W. Lewandowski,* on the brief; Mr. *Warren W. Wilentz,* of counsel; Messrs. *Wilentz, Goldman & Spitzer,* attorneys).

Mr. *Arnold B. Levin,* Assistant Prosecutor, argued the cause for respondent (Mr. *Vincent P. Keuper,* Monmouth County Prosecutor, attorney).

PER CURIAM

Defendant appeals from a judgment of conviction of perjury. The indictment charged that defendant falsely, willfully and corruptly swore before the grand jury that he did not say in the presence of a State trooper and two police officers of the City of Long Branch: "'We can take care of the Mayor. We got three Councilmen. Tonight or tomorrow we'll have number four'; and did say other words in substance and in effect that he the said Anthony Russo had Mayor Paul Nastasio in his pocket and could control the said Mayor Paul Nastasio."

Defendant's first trial in Monmouth County resulted in a hung jury. Prior to retrial defendant renewed his application for a change of venue which was granted, and the second trial was held in Burlington County.

Appendix A

At trial defendant did not take the stand as a witness and on this appeal he does not challenge the legal sufficiency of the State proofs except to contend that (1) there was no evidence presented by the State identifying defendant as the Anthony Russo who allegdly perjured himself before the grand jury, and (2) the language which defendant denied using when he appeared before the grand jury is not the same language set forth in the indictment.

We find these contentions to be legally frivolous. Defendant's identity never was and is not now in issue. Absent some question as to identification being raised by defendant, the jury had every right to infer that the Anthony Russio on trial was the same Anthony Russo mentioned in the indictment and the testimony of the State's witnesses. The argument as to semantics is based on variations in language which we find to be inconsequential.

Defendant's basic contention is that he was a prospective defendant or target of the grand jury investigation and should have been told of this fact and advised of his constitutional rights, particularly his right to remain silent when he appeared before the grand jury. Since this was not done, defendant argues that the alleged perjurious testimony given by him at that time should have been excluded at his trial and its use requires a reversal.

This argument lacks merit. Assuming defendant was a target of the grand jury investigation, the Fifth Amendment mandate against compelling a person to be a witness against himself is unrelated to perjury. Defendant was not indicted on the basis of any self-incriminating testimony he gave which implicated him in a crime committed

previous to his appearance before the grand jury. Defendant was indicted for having lied when he appeared before the grand jury and testified under oath. The constitutional right to remain silent is intended to protect a person from being compelled to incriminate himself, not from committing perjury.

Defendant next argues that the trial court erred in refusing to instruct the jury that proof of perjury must be clear, convincing and direct and if the jury found defendant's responses or answers to be literally accurate or technically responsive such a finding would require the acquittal of defendant.

This point lacks substance. The trial court charged the jury that the State had the burden of proving each of the elements of the crime charged beyond a reasonable doubt and that unless that burden was sustained defendant must be acquitted. In carrying its burden it was not incumbent on the State to establish verbatim the exact words spoken by defendant. The essence of perjury is the willful assertion as to a matter of fact knowing such to be false with intent to mislead. Defendant, in his appearance before the grand jury, was not held to a "yes" or "no" answer when he was asked as to whether he had made certain statements in the presence of the three officers. Indeed he was asked for and gave his version of the conversation with the officers.

Defendant's next ground of appeal is that the court erred in denying defendant's request to examine the complete grand jury testimony of the three officers who testified at defendant's trial, as well as the grand jury testimony of Armand Tomaine, Sr., and Armand Tomaine,

Jr., who appeared before the grand jury but did not testify at trial.

Defendant was furnished with a complete transcript of his own grand jury testimony and excerpts of the grand jury testimony of the officers and the Tomaines. The then pertinent rule *R.R.* 3:5-11(c) (now *R.* 3:13-3(c)) permitted a defendant to inspect "any *relevant* grand jury testimony" of persons having relevant evidence or information. Defendant contends that due process requires that the question of relevancy can be determined only by the defendant and not by the prosecutor or even the court itself.

We think it clear that the issue of relevancy is ultimately for the court to decide. Indeed, at the hearing on defendant's motion to inspect the grand jury testimony of the Tomaines, counsel for defendant suggested and it was ordered that the trial judge decide what portions of such testimony were relevant to the charge against defendant and that such portions be then made available to defendant.

Since the record is not clear as to what action was taken in this regard, we inquired of the trial judge and were advised by him that prior to defendant's second trial he reviewed the entire grand jury testimony of the three officers, as well as the two Tomaines and that the portions of such testimony made available to defendant were the only portions he found to be relevant to the charges against defendant. We add that we have read the grand jury testimony in question and conclude that the portions thereof reproduced in defendant's appendix were the only portions relevant to the charges of perjury against defendant. See: *State* v. *Kuwa*, N.J. (Dec. 16, 1969), where

the court approved this type of approach in dealing with presentence reports, and *R.*3:13-3(g).

Defendant's next point is that the State's utilization of the testimony of witnesses Graff and King at defendant's second trial, without having made available to defendant the grand jury testimony of these witnesses, constitutes reversible error.

We cannot agree. The State notified defendant in advance that it proposed to use Graff and King as witnesses at defendant's second trial. Counsel for defendant states that a letter was written to the prosecutor requesting the grand jury testimony of these persons. However, no motion for such testimony was made and at defendant's second trial Graff and King testified as witnesses for the State without objection and were cross-examined. Now for the first time defendant complains that the testimony of these witnesses should have been excluded. Under the circumstances presented, we conclude that the challenge to this testimony comes too late. Had the matter been called to the trial court's attention it would have been taken care of promptly.

Defendant next argues that the trial court committed prejudicial error in denying defendant's motion for a mistrial based on certain remarks of the prosecutor during summation. We have reviewed the prosecutor's summation and find it to fall within the limits of permissible argument. The questionable reference to "this investigation" was stricken by the court.

Finally defendant argues that his motion for a new trial on the grounds of newly discovered evidence should have been granted. We have reviewed the defendant's proofs

and agree with the determination of the trial judge that the evidence in question failed to satisfy the basic requirements of newly discovered evidence in that: (1) it was not really material to the issue; (2) the chance that it would change the result of defendant's trial was a very remote speculation; and (3) it could have been discovered before the end of the trial by the exercise of due diligence.

Affirmed.

A True Copy

Mortimer G. Newman, Jr.
Clerk

APPENDIX B

Order of the Supreme Court of New Jersey Denying Petition

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 10th day of March, 1970.

JOHN H. GILDEA
Clerk of the Supreme Court